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No. 85-1268

In the Supreme Court of the United States

OCTOBER TERM, 1985

MASSMAN CONSTRUCTION CO., PETITIONER

v.

TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner is entitled to de novo review of its contract claim under the Contract Disputes Act of 1978.

2. Whether the decision of the hearing officer was supported by substantial evidence.

3. Whether petitioner's due process rights were violated by respondent's hearing procedures.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is reported at 769 F.2d 1114. The opinions of the district court (Pet. App. A30-A43) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A116) was filed on August 13, 1985, and a petition for rehearing was denied on October 25, 1985 (Pet. App. A117). The petition for a writ of certiorari was filed on January 23, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges the partly unfavorable resolution by an administrative hearing officer of its claim against the Tennessee Valley Authority (TVA) arising from a construction contract dispute. The United States District Court for

the Eastern District of Tennessee upheld the hearing officer's decision (Pet. App. A30-A43), and the court of appeals affirmed the district court in all relevant respects (*id.* at A1-A29).

1. a. On March 13, 1975, following competitive bidding, TVA awarded petitioner a $2,565,400 contract for the excavation of a discharge channel in the Tennessee River and construction of sheet pile cells in the channel at TVA's Raccoon Mountain pumped-storage project near Chattanooga, Tennessee (Pet. App. A1-A2). The invitation to bid, which became a part of the contract, stated that "[i]t is expected, but not guaranteed, that TVA's construction schedule will require that work be started June 15, 1975, and completed December 15, 1975" (Pet. App. A73; Administrative Record (A.R.) 419). The invitation also advised bidders to visit the site and talk to one of two named individuals to acquaint themselves with conditions which might affect performance of the work (Pet. App. A73-A74; A.R. 419). Petitioner visited the site before submitting its bid and was informed by one of the named individuals that work would not commence before October 1, 1975 (Pet. App. A74). Petitioner's bid stated (A.R. 418):

> Due to the uncertain nature of the time period in which the work will be performed, we are not able to list the equipment which will be available for this project. However, sufficient equipment will be available [and] description of same can be furnished when time period is established.

Work did not in fact start until August 1976 (Pet. App. A2). In addition, TVA suspended underwater excavation work for environmental reasons between April 30, 1977, and August 1, 1977 (*ibid.*).

Petitioner claimed that these delays resulted in increased costs to it in completing the work (Pet. App. A2). Its claims were initially decided by a TVA contracting officer, but petitioner contended that the amount allowed was insufficient and appealed his decision pursuant to the contract's "disputes" clause (*id.* at A2-A3). The clause provided for such an appeal and a hearing before TVA's General Manager or his designated representative (*id.* at A3, A32-A33 n.1). On January 18, 1980, the General Manager designated as his hearing officer Kenneth L. Penegar, Dean of the University of Tennessee School of Law (*id.* at A3, A34).

b. The hearing officer, with the agreement of the parties, held separate hearings on liability and damages (Pet. App. A3). The hearing on liability opened on August 4, 1980; on March 3, 1981, the hearing officer issued his decision (*ibid.*; Pet. App. A70-A95). He ruled that TVA was liable for the delay of the starting date after October 1, 1975, and also for the suspension of underwater excavation work between April 30 and August 1, 1977 (see *id.* at A3, A93-A95).[1] He rejected petitioner's contention that TVA was liable for all delays after June 15, 1975. On August 12, 1982, following a separate hearing on damages, the hearing officer issued his damages decision (*id.* at A3, A55-A69). The officer rejected petitioner's contention that TVA was liable for the total increased cost, finding that there were significant causes of increased costs for which petitioner was itself responsible (*id.* at A56-A57). The hearing officer then examined each item of increased cost claimed by petitioner and made detailed findings and conclusions as to all of them (*id.* at A58-A69). Because of the total cost basis on which petitioner's evidence had been presented, additional computations

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[1]The hearing officer also found that, if working through an extra winter (with its attendant delays) caused petitioner costs in addition to those contemplated by its bid, they were chargeable to TVA as well (Pet. App. A55, A94-A95).

as to various damages items were required to produce final dollar figures for a final order. The damages decision directed that the parties make these computations and submit an agreed final order incorporating them (*id.* at A69).

The proposed order which TVA prepared provided for an award of $378,541 in damages (Pet. App. A3-A4). Petitioner rejected this proposed order and submitted its own, which called for an award of $1,230,139; unlike TVA, however, petitioner included little or no explanation of how its calculations were made or what their relation was to the hearing officer's findings and conclusions (*id.* at A3, A52-A54; May 20, 1983, Small Aff. Exh. D). When asked by the hearing officer for such an explanation, petitioner, in a letter dated October 29, 1982, identified no errors in TVA's calculations, but instead reargued its (already rejected) total cost theory (May 20, 1983, Small Aff. Exh. F; Pet. App. A52-A54). On May 27, 1983, the hearing officer issued a final order (*id.* at A44-A50) adopting the damages calculations in TVA's proposed order and awarding petitioner $378,742 (which was $41,925 less than had already been paid by TVA to petitioner pursuant to the contracting officer's award). See also *id.* at A42.

2. a. On March 17, 1983, prior to the hearing officer's final order, petitioner filed the present action, seeking a de novo court trial of its claims. On August 5, 1983, after the hearing officer issued his supplemental opinion and final order, petitioner filed an amended complaint in which it contended for the first time that it had been denied its rights under the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.* It contended in the alternative that the hearing officer's damages decision, supplemental opinion, and final order were arbitrary, capricious, not supported by substantial evidence, and erroneous as a matter of law, and should therefore be set aside, and that petitioner's due process

rights had been violated in the disputes proceeding. See Pet. App. A35.

The district court (Pet. App. A30-A36) concluded first that petitioner had waived its right to proceed under the Contract Disputes Act since it had failed to meet the requirement set forth in 18 C.F.R. 1308.4 that it include a notice of such an election in its letter first submitting a claim to TVA (Pet. App. A34-A35). Finding that petitioner was thereby bound to the remedies provided it in the contract's disputes clause, the district court then "thoroughly reviewed" the voluminous evidentiary record compiled before the hearing officer and affirmed his findings and conclusions, concluding that "[petitioner's] allegations are totally without merit" (*id.* at A35). Petitioner filed a motion to reconsider, which the district court (*id.* at A37-A43) denied as well, stating: "This Court agrees with [the hearing officer's] decision and finds it supported by the only and therefore substantial evidence" (*id.* at A43).

b. The court of appeals (Pet. App. A1-A29) affirmed the decision of the district court in all relevant respects. It concluded first (*id.* at A5-A10) that the Contract Disputes Act did not apply because of petitioner's waiver, although on somewhat different grounds than the district court: "We rather state as grounds for our decision that [petitioner] has waited too long for institution of action *under the plain language of the Act itself*" (*id.* at A9 (emphasis in original)). It concluded as well that petitioner was afforded due process (*id.* at A25-A27) and that "[petitioner] generally failed to prove its major claims for damages" (*id.* at A28). Nonetheless, "in the interest of justice" and not because of any identified error, the court of appeals ordered a limited remand to allow petitioner to present additional evidence to the hearing officer as to three damages claims rejected by him because petitioner had failed to provide evidence to support them (see *id.* at A27-A28).

ARGUMENT

The decision of the court of appeals in this factbound dispute is correct and does not conflict with any decision of this Court or of any other court of appeals. Review by this Court—the fifth tribunal to which petitioner has gone—is unwarranted.

1. Petitioner's first contention (Pet. 8-16) is that he is now entitled to proceed under the Contract Disputes Act of 1978 (CDA or the Act), 41 U.S.C. 601 *et seq.*, which provides for de novo review of contract claims. This contention is without merit.

The court of appeals affirmed the district court's holding that petitioner had waived its right to proceed under the CDA since "[petitioner] knowingly chose to present its claims pursuant to the contract's Dispute[s] clause" (Pet. App. A10). It pointed out that the CDA by its terms requires claims against the TVA to be "filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim" (41 U.S.C. 609(a)(3)). Here, the date of receipt of decision was November 20, 1979, but petitioner did not file until March 17, 1983—40 months later (Pet. App. A9-A10). The court of appeals was clearly correct that petitioner's proceeding through two full evidentiary hearings before the hearing officer, together with its failure to file suit prior to November 20, 1980, constituted a knowing election to proceed under the disputes clause (see *ibid.*).[2] See also *H.R. Henderson & Co.* v. *United States*, 169 Ct. Cl. 228, 245 (1965) (invoking estoppel in a similar context).[3]

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[2]As discussed at page 5, *supra*, the district court found waiver based on TVA's regulations rather than on the CDA. Either rationale is correct.

[3]The cases cited by petitioner (Pet. 8-16) are inapposite. Because petitioner made no election in the letter submitting its claim, it had no right under TVA's regulations to proceed under the CDA, and there

Under these circumstances, the essentially factual determination that petitioner waived its right to proceed under the CDA does not merit further review.[4]

2. Petitioner also challenges the hearing officer's decision (Pet. 16-28). Both of the courts below thoroughly examined the detailed record and found that decision to be supported by substantial evidence, and not to be arbitrary, capricious, or "grossly erroneous." This is conclusive as to the essentially factual issues petitioner raises. See *Berenyi* v. *District Director, INS*, 385 U.S. 630, 635-636 (1967); *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 213-214 (1948).

In any event, petitioner's assertions are without merit. Petitioner's contention (Pet. 16-20) that the court of appeals' decision erroneously allowed an individual TVA employee to change the contract starting date from June 15, 1975, to October 1, 1975, ignores the fact that the contract document expressly stated that the June 15, 1975, date was "not guaranteed" and advised prospective bidders to visit the site and meet with one of two designated individuals to discuss the work (see page 2, *supra*).

Petitioner's contention (Pet. 21-24) that it should have received a profit markup under the "changes" clause of the contract on its increased costs from delay and work suspension is answered by *United States* v. *Rice*, 317 U.S. 61

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was therefore no violation of the regulations in not informing petitioner of a right it did not have; moreover, the Court of Claims' willingness to afford plaintiffs relief hinged on the facts of the particular cases, and petitioner's delay here was inexcusable. See *National Elec. Coil* v. *United States*, 227 Ct. Cl. 595 (1981); *H.R. Henderson & Co.* v. *United States, supra*.

[4]Of course, the issue of what constitutes waiver in the time period between enactment of the CDA and the date on which it became automatically effective is of limited—and diminishing—importance.

(1942), involving a changes clause which the court of appeals found "strikingly similar" to that involved here; in *Rice*, this Court held that such a changes clause does not allow an award of consequential damages based on a delay which makes no change in the work to be done. The decisions of the Court of Claims referred to by petitioner could not, of course, affect the continuing authority of a decision of this Court (see *United States* v. *Mason*, 412 U.S. 391, 396 (1973)); in any event, those decisions allowed recovery of costs or damages, not a profit markup, and are therefore consistent with the award by the court of appeals here of damages only.[5]

Petitioner's claims (Pet. 25-28) regarding burden of proof and evidence of damages are equally meritless and undeserving of review. The rule applicable in an appeal by a

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[5]Other cases—as well as the changes clause's plain language—confirm that the hearing officer (Pet. App. A67-A68) was correct in finding the clause inapplicable altogether. In general, absent particular contract provisions calling for a contrary result, delays constitute contract breaches entitling the contractor only to damages, and not to an equitable adjustment under a changes clause. See *Cosmo Constr. Co.* v. *United States*, 439 F.2d 160, 167-168 (Ct. Cl. 1971); *L.L. Hall Constr. Co.* v. *United States*, 379 F.2d 559, 561-562 (Ct. Cl. 1966); 4 J. McBride, T. Touhey & B. McBride, *Government Contracts* § 28.70[1], at 28-216 (1985) ("Stated broadly, the changes clause is inapplicable to a claim of delay"). As the court of appeals noted (Pet. App. A20), a profit markup is not ordinarily allowed on claims for breaches of contract that do not change the scope of the work but only the cost of performing it. See, *e.g.*, *J.D. Hedin Constr. Co.* v. *United States*, 347 F.2d 235, 259-260 (Ct. Cl. 1965); *Oliver-Finnie Co.* v. *United States*, 279 F.2d 498, 508 (Ct. Cl. 1960). A contract can, of course, specifically provide for an equitable adjustment for delay. This is often done by including a "suspension of work" clause in the contract (see 32 Fed. Reg. 16268 (1967); *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 415-416 (1966)), or a "modified changes" clause (see 41 C.F.R. 1-7.602-3 (1984)). Petitioner's contract did not contain such a clause and, even where such clauses are included, they typically do not permit a profit markup on the delay and "suspension impact" costs authorized by such provisions. See *Holloway Constr. Co.* v. *United States*, 4 Cl. Ct. 779, 789 (1984).

contractor from a contracting officer's decision is that the appeal opens up every part of the decision, including those parts that are favorable to the contractor, for de novo decision by the hearing officer based on the evidence presented at the hearing before him. See, *e.g., Southwest Welding & Mfg. Co.* v. *United States*, 413 F.2d 1167, 1184-1185 (Ct. Cl. 1969); 1A J. McBride, T. Touhey & B. McBride, *Government Contracts* § 6.70[5] (1985 & Supp. 1986). Moreover, as the court of appeals noted (Pet. App. A13), this rule was specifically incorporated in the disputes clause of the contract here (see *id.* at A32 n.1). At the hearing, the burden of demonstrating damage remains, therefore, on the party claiming the breach (see, *e.g., id.* at A17-A18).

Regarding allocation of damages, the hearing officer could have rejected petitioner's inadequate proof of damages entirely for failure to make any effort to show to what extent its damages were the responsibility of the government. See, *e.g., Commerce Int'l Co.* v. *United States*, 338 F.2d 81, 89-90 (Ct. Cl. 1964). Instead, he went through the evidence point by point to allocate damages whenever the evidence permitted his doing so. Moreover, "in the interest of justice," the court of appeals has directed the district court on remand to allow petitioner another chance at demonstrating certain alleged damages attributable to TVA's delays despite the absence of any clear error in the hearing officer's assessment of those damages (Pet. App. A19-A20, A28). Under these circumstances, review by this Court is clearly unwarranted.[6]

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[6]This approach is entirely consistent with the liberal approach used in *S.W. Electronics & Mfg. Corp.* v. *United States*, 655 F.2d 1078 (Ct. Cl. 1981), on which petitioner relies. The court in *S.W. Electronics* also held that the total cost theory has long been "disfavor[ed]" (*id.* at 1086) and recognized it was being "liberal" in its judgment because of the "unique situation on appeal" there (*id.* at 1089). Moreover, as the language from *S.W. Electronics* that petitioner quotes (Pet. 27) makes clear, in that case plaintiff had made "efforts to present all available

3. Petitioner's final contentions (Pet. 28-30) are that it was denied due process because TVA's Office of the General Counsel assisted TVA's General Manager in selecting and evaluating hearing officers and administering their personal services contracts with TVA, responded incorrectly to petitioner's inquiry about TVA's contract disputes regulations, and made three telephone calls to the hearing officer to inquire about the status of the proceeding. Both the district court and court of appeals correctly held that none of this resulted in any denial of due process.

The limited involvement of TVA's Office of the General Counsel in assisting TVA's General Manager in selecting and evaluating hearing officers and administering their personal services contracts with TVA is in no way improper.[7] See *Withrow* v. *Larkin*, 421 U.S. 35, 46-59 (1975); *Marcello* v. *Bonds*, 349 U.S. 302, 311 (1955); *Jonal Corp.* v. *District of Columbia*, 533 F.2d 1192, 1196-1197 (D.C. Cir.), cert. denied, 429 U.S. 825 (1976).[8]

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evidence on damages" and the damages in question were " 'definitely attributable to the wrong' "—neither of which is the case here (655 F.2d at 1088-1089 (citation omitted)).

[7]TVA's General Manager, in accordance with TVA's normal practice, makes the actual designation and appointment of the hearing officer in a specific case (Willis Dep. 8; Sanger Dep. 32-33; Fox Dep. 6). The role of TVA's attorneys is limited strictly to drafting a proposed appointment letter for the General Manager to review and sign (based on which hearing officers are busy and which are not), whereby the General Manager designates a hearing officer from among a group of three or four individuals, all of whom TVA has previously determined to be qualified (Willis Dep. 8; Sanger Dep. 32-33; Fox Dep. 4-5, 6-7). This was the procedure followed in this case.

[8]*Baltimore Contractors, Inc.* v. *United States*, 643 F.2d 729 (Ct. Cl. 1981), cited by petitioner (Pet. 28-30), is not to the contrary. While the court pointed out that the same entity whose decisions were being appealed also had a significant role in selecting those who would decide these appeals, the circumstances which led the court there to invalidate a contract appeals board decision also included the following facts:

The January 18, 1980, response of TVA's General Counsel to petitioner's inquiry about TVA's contract dispute regulations was correct. In any event, petitioner had ample opportunity to challenge TVA's regulations and the agency's interpretation of them; moreover, petitioner's suit was untimely under the CDA itself.

The court of appeals and the district court both noted that "uncontroverted testimony" showed that the three telephone conversations between counsel for TVA and the hearing officer involved solely procedural matters (Pet. App. A25-A27, A35-A36, A43),[9] and petitioner apparently concedes (Pet. 29-30) that "the merits of [its] claim was not

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(1) General Accounting Office (GAO) attorneys served part-time as members of the contract appeals board even though their full-time GAO supervisors were involved in advising the government with respect to various claims under the contract at issue, (2) office space and secretarial personnel were shared between government trial counsel and members of the contract appeals board, and (3) ex parte communications in the form of memoranda concerning the contractor's claims were furnished to the chairman of the contract appeals board by the government's trial counsel. None of these three circumstances is present here.

[9]TVA counsel swore in filed affidavits that the calls were to inquire when a final decision in the proceeding might be issued (Aug. 23, 1983, Small Aff.; Fox Aff.). The calls were made during the pendency of petitioner's original complaint claiming that delay in rendering the decision entitled petitioner to renounce the proceeding before the hearing officer, so the information as to when the decision could be expected was of obvious relevance to TVA's preparation for defense in the action. The merits of the case were not discussed, nor was a decision pressed for. The substance of the conversations was promptly communicated to the district court and to petitioner in TVA's brief, filed on May 23, 1983, a few days after the last phone call (Fox Aff.). During the first call, the hearing officer, being unable then to give an expected date, suggested that a further inquiry or inquiries be made later (Aug. 23, 1983, Small Aff.). While in most formal civil litigation, requests about procedural matters may be made through a clerk without direct communication with the judge, in more informal proceedings such as this, no clerk is employed and such requests, if they are to be made at all, must be made to the hearing officer.

discussed." There is nothing improper about such communications and, even if there were, they certainly were not prejudicial in this case and provide no basis for overturning an otherwise valid decision; the cases cited by petitioner (Pet. 28-30) are not to the contrary (see, *e.g.*, *PATCO* v. *Federal Labor Relations Auth.*, 685 F.2d 547, 563, 568-569 (D.C. Cir. 1982)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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